93-112

Supreme Court, U.S.
FILED
JUN 17 1993
OFFICE OF THE CLERK

NO._____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

RUSSELL PRITCHARD, JR. AND
DEBORAH PRITCHARD,

Petitioners

VERSUS

MELVIN GOODIE, ET AL

Respondents

PETITION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

Did the Court of Appeal err in affirming the Trial Judge's factual finding that the actions of Officer Melvin Goodie when he beat Russell Pritchard, although he was off duty, did not constitute conduct "under color of state law" as required by 42 U.S.C. Section 1983?

NAMES OF ALL PARTIES

1. Russell Pritchard, Jr. - Plaintiff
2. Deborah Pritchard - Plaintiff
3. Estate of Melvin Goodie - Defendant
4. Breaux Bridge Police Department - Defendant
5. Police Chief George Menard - Defendant
6. Howard Devillier - Defendant

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OPINIONS BELOW

There are no reported opinions in this case. The opinion of the Court of Appeals for the Fifth Circuit is attached hereto as Attachment A. The opinion of the United States District Court for the Western District of Louisiana is attached hereto as Attachment B. The Trial Judge's reasons for judgment are attached hereto as Attachment C.

I.
GROUNDS FOR JURISDICTION

On March 25, 1993 the United States Court of Appeal for the Fifth Circuit affirmed the United States District Court (Western District of Louisiana) decision. The Supreme Court of the United States has jurisdiction to review the judgment in question under 28 U.S.C. 1254.

II.
CONSTITUTION AND STATUTORY PROVISION

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Russell Pritchard was traveling to his home in Breaux Bridge, Louisiana from work at approximately 8:00 p.m. on September 17, 1987. Pritchard was proceeding on Rees Street, a roadway leading to Breaux Bridge, Louisiana. A truck in front of him came to an abrupt unsignaled stop. Pritchard stopped suddenly due to the abrupt stop by the truck preceding him, causing the vehicle behind Pritchard to blow his horn. The truck preceding Pritchard then made an unsignaled left turn. When the preceding truck made the unsignaled left turn, Pritchard rolled down his window and called out "stupid nigger." Pritchard continued on Rees Street toward Bridge Street. The driver of the truck turned around and pursued Pritchard. The driver of the truck pursued Pritchard through the Town of Breaux Bridge, and on one occasion passed Pritchard and jammed on his brakes trying to stop Pritchard.

During the chase, the truck flashed his headlights from bright to dim numerous times, blew his horn and waved his arm out the truck window and shouted at Pritchard. Pritchard approached the Ruth Canal Bridge, and had to stop his vehicle to wait for vehicles crossing the single laned bridge. At the Ruth Canal Bridge Pritchard's car door was suddenly opened and the truck driver struck Pritchard with his fist three times consecutively on the left side of Pritchard's face.

Pritchard did not see the truck driver approach his vehicle. Melvin Goodie, the truck driver, had a muscular build and was approximately six foot three inches in height and two hundred thirty to two hundred forty pounds. After the altercation, the truck driver returned to his truck. Pritchard followed in his vehicle to obtain the license plate number of the truck. Pritchard then proceeded to the Breaux Bridge Police Department and observed the truck driver arriving at the police department simultaneously with him. The truck driver grabbed

Pritchard by the back of the neck, pushed him and shoved him through the door of the police station and told Officer David Clark to "take care of him". The truck driver brought Pritchard to a room and left him in the room in the dark with the door locked for appr ximately five minutes.

Later, Officer Howard Devillier entered the room, identified himself and identified the driver of the truck as Officer Melvin Goodie. Goodie continued to rant, rave and curse at Pritchard while at the police station. Goodie continued this behavior for approximately ten to fifteen minutes until Officer Devillier called for assistance. Officer David Clark entered the room and attempted to get Goodie to leave. Officer Devillier requested Goodie to leave which request was refused by Goodie. Pritchard phoned his wife, Deborah Pritchard, who arrived approximately ten minutes later with a family friend, Gerald LeBlanc. Goodie continued to harass Pritchard even after his wife and Gerald LeBlanc arrived.

Pritchard was permitted to travel to Gary Memorial Hospital to receive medical treatment for his face which was badly bruised and lacerated due to the blows received from Goodie. Pritchard returned to the police station approximately two hours later. Pritchard learned he had been charged with two offenses, disturbing the peace by use of vulgar language and resisting an officer. These charges were subsequently dismissed.

Pritchard was treated by Dr. Morell Yongue at the Gary Memorial Hospital for bruises and lacerations. He consulted Dr. Yongue on two more occasions after the date of the incident. Pritchard also received treatment from Dr. Denbo Montgomery on one occasion.

Goodie continued to harass Pritchard after this incident by following him through town even past the city limits of Breaux Bridge, Louisiana to Pritchard's home. The incident and subsequent activity of Goodie caused Pritchard to become

extremely paranoid in regard to his well being and that of his wife and daughter. Pritchard consulted Dr. Luther Cole, a clinical psychologist, who concluded that Pritchard suffered from post-traumatic stress disorder and was paranoid and hypervigilant. Pritchard consulted Dr. Cole intermittedly from August, 1988 to the date of trial.

Pritchard brought a lawsuit in the United States District Court for the Western District of Louisiana. That Court had jurisdiction to hear and decide the matter pursuant to 42 U.S.C. 1983, 1985, 1986 and 1988 as well as a first, fourth, fifth, eighth and fourteenth amendments to the United States Constitution as well as 28 U.S.C. 1331 and 1343.

The Trial commenced on December 16, 1991, December 17, 1991, and continued to January 27, 1992 and January 28, 1992. The matter was taken under advisement and reasons for judgment were rendered March 4, 1992 and a formal judgment signed March 31, 1992. A Notice of Appeal was lodged by plaintiffs on April 13, 1992. The Fifth Circuit Court of Appeal affirmed the District Court and plaintiffs now ask this Honorable Court for review of the improper judgment.

ARGUMENT ON ISSUE

I. Did the Court of Appeal err in affirming the Trial Judge's factual finding that the actions of Officer Melvin Goodie when he beat Russell Pritchard, although Officer Goodie was off duty, was not conduct "under color of state law" as required by 42 U.S.C. Section 1983?

The trial court held that Goodie was not acting "under color of State law" because he was off duty on September 17, 1987 and did nothing to indicate that he was a police officer.

The provisions of 42 U.S.C. Section 1983 provide:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of State, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

An action by a party will be determined to be under the color of state law when there is a sufficiently close nexus between a state and a challenged action. Johnson v. Orr, 780 F.2d 836 (3rd Cir. 1986).

On September 17, 1987 at the time of the incident Melvin Goodie was off duty. Nevertheless, Goodie testified in his deposition as well as in his criminal trial and in his statement that he was acting as a police officer during his chase of the Pritchard vehicle and also during his altercation with Pritchard and thereafter at the police station. Goodie testified at his criminal trial that:

"It was up to my duties as a police officer, seeing that the guy was driving recklessly that - that there was either somebody else that might be in danger or he might endanger somebody else's life by driving the way, in that manner he was driving."

Goodie testified on several occasions that he showed his officer's badge in an attempt to stop Pritchard and also verbally identified himself as a police officer. Goodie blew the horn on his vehicle and blinked his lights in an attempt to stop Pritchard. Goodie testified in his deposition that Pritchard was under arrest when he told him to go back to the police station.

At his criminal trial Goodie testified he was in pursuit of Pritchard and Pritchard was fleeing from him through town. Although Pritchard testified at trial he saw the lights of Goodie's truck flicker from bright to dim repeatedly, he heard shouting and heard Goodie's horn blowing, he could not understand what Goodie was saying and was too far away to observe Goodie holding the badge.

Goodie testified that after arrival at the police station he escorted Pritchard to the interrogation room. Officer Clark confirmed that statement. The interrogation room is located in the rear of the police station. Goodie and Pritchard entered through the front door of the station according to Officer Clark.

Goodie testified at his criminal trial that he "arrested" Pritchard. The official arrest report revealed Pritchard was charged with "resisting an officer". The booking sheet indicated Goodie was the arresting officer. The location of the alleged offense committed by Pritchard was within the city limits of Breaux Bridge, Louisiana.

Pritchard was not charged with a crime against a civilian, rather he was charged with "resisting an officer". The officer against whom the offense was committed was Officer Goodie. This confirms that Goodie was engaged in his duties as

a police officer at the time of the alleged offense by Pritchard. Otherwise, he could not be charged with "resisting an officer".

The booking sheet referred to Melvin Goodie as "Officer Goodie". The affidavit of charges with respect to Pritchard's offense of "resisting an officer" stated that Pritchard was "stopped by officers, and he refused to give information and an altercation occurred between subjects".

Officer Howard Devillier testified Goodie told him he identified himself as an officer to Russell Pritchard and showed his badge. Officer Devillier testified that off duty arrests were allowed by the Breaux Bridge Police Department and he had made off duty arrests while employed with the Breaux Bridge Police Department. Officer Devillier further testified that officers could make arrests while off duty because they were police officers twenty-four hours once you make that commitment, and when you see something of injustice, you are supposed to take action.

Melvin Goodie assisted Officer Howard Devillier in a search of Pritchard's vehicle. This further confirms that Goodie was not acting as a civilian as he would not have made an arrest and subsequently searched the Pritchard vehicle. Additionally, if Goodie was acting as a civilian, instead of a police officer, why was he not arrested for harassing and threatening Pritchard?

After arrival at the police station Goodie testified he told Pritchard to get out of his car and told the dispatcher on duty to call a patrolman to accomplish the booking procedure. Goodie testified that he put Pritchard in the back room with the door closed. These were actions of a police officer, not a civilian.

The distinction between whether or not a police officer is on duty or off duty or in uniform or out of uniform is not controlling on a determination of whether the officer was acting under color of state law for purposes of the civil rights statute. Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975). The actions of an officer who undertakes to perform official duties are included

within 42 U.S.C. Section 1983 whether they hew to the line or over step it. Cluse v. United States, 325 U.S. 91, 65 S.Ct 1031 (1945).

The inquiry should be the nature of the act performed, not the clothing of the actor or whether the actor is on duty or off duty in reaching a determination as to whether the officer is acting under color of state law for purposes of the Civil Rights Statute. Stengel v. Belcher, supra. An off duty police officer although not in uniform, but who is in possession of a badge and gun and who is subject to department regulations is required to "be always subject to duty" and/or acting under color of state law within 42 U.S.C. Section 1983. Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977).

Prior rulings have held that an off duty police officer is acting under color of state law when, while working as a security guard, he identifies himself as a police officer, displays his badge and tells a shopper she is under arrest and files an arrest report with the police department. Alvarado v. Dodge City, 702 F.2d 935 (Kan. 1985). Further, cooperative activity between the police department and an off duty officer employed as a security guard is sufficient to make an off duty officer "acting under color of state law". Kendal v. Orr, 628 F.Supp. 326 (D.C. Kan. 1985). In Stengel v. Belcher, supra, Belcher was an off duty police officer in a cafe with his girlfriend. He was not in uniform at the time. A fight broke out in the cafe and without identifying himself as a police officer at any time, Belcher involved himself in the altercation. On appeal, Belcher claimed he was engaged in private social activities, was not in uniform, was off duty and never identified himself as an officer. (Stengel at pps. 440 and 441). The police officer in Stengel testified as did Officer Devillier in the instant case that official regulations require an officer to take action in any type of police or criminal activity twenty-four hours a day. The court found Officer Belcher was acting under color of state law.

Plaintiffs contend that Officer Goodie was acting as a police officer and Officers Devillier and Clark cooperated with him as such. The following activities substantiate that Goodie's actions were in his capacity as a police officer:

1. Repeatedly attempting to identify himself as an officer;

2. Arresting and filing charges against Pritchard for resisting an officer;

3. Escorting Pritchard to the interrogation room and locking him in it;

4. Directing Officer Clark to call another officer to assist him;

5. Directing Officer Clark to "take care" of Pritchard;

6. Assisting Howard Devillier in a search of Pritchard's car;

7. Being allowed to harass Pritchard verbally in the presence of Officers Clark and Devillier without intervention: and

8. Designating himself as the arresting officer on the booking sheet and affidavit.

In view of the foregoing it appears clear that the trial court erred when they found that Goodie was not acting as an officer so as to make Goodie's actions under color of state law as required by 42 U.S.C. Section 1983.

CONCLUSION

The finding by the lower courts that Officer Melvin Goodie was not acting "under color of state law" was erroneous. The proper analysis and conclusion would result in a finding that Officer Goodie was acting "under color of state law" as required under 42 U.S.C. Section 1983. Petitioners pray that this Honorable Court review the statements and record and overturn the deci-

sion, granting judgment in favor of petitioners, Russell Pritchard, Jr. and Deborah Pritchard.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to all counsel of record by placing same in the United States Mail, postage prepaid and properly addressed. Opelousas, Louisiana, this 14th day of June, 1993.

_____
Leslie J. Schiff

APPENDIX

1. Judgment of Court of Appeals for the Fifth Circuit

2. Opinion of the United States District Court for the Western District of Louisiana

3. Reasons for Judgment of United States District Court for Western District of Louisiana

March 25, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-44 34

RUSSELL PRITCHARD, JR. AND DEBORAH PRITCHARD

Plaintiffs-Appellants,

VERSUS

MELVIN GOODIE, ET AL .

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(88-CV-2295)

Before GARWOOD and HIGGINBOTHAM, Circuit Judges, and SCHWARTZ , District Judge.

PER CURIAM:

This is an appeal from a bench trial wherein the district court found that the altercation of an off-duty police officer with appellant Russell Pritchard was not an act under the color of

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*Senior District Judge of the Eastern District of Louisiana, sitting by designation.

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

state law. Further, the district court held that the City of Breaux Bridge and its Chief of Police could not be held liable under federal or state law for the purely private acts of one of its employees. Appellants on appeal contest these holdings; the district court's factual findings regarding the behavior of two officers present during a portion of the altercation; the credibility of a witness; the admissibility of certain testimony; and the quantum of damages. Finally, the appellants urge us to reverse because the district court refused to recuse itself from the case and grant a new trial.

We hold that the district court's findings with respect to whether the defendant acted under the color of state law are not clearly erroneous. Therefore, appellants' arguments regarding the City of Breaux Bridge and the Chief of Police are moot. Likewise, the district courts factual findings regarding the behavior of the two officers present during the ongoing altercation, the credibility of a witness, the admission of testimony, and the quantum of damages were not clearly erroneous. Lastly, we hold that the district court properly refused to grant appellants' motion for recusal of the trial judge and a new trial.
AFFIIRMED.

March 31, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

RUSSELL PRITCHARD, JR. AND DEBORAH PRITCHARD	:	CIVIL ACTION NUMBER: 88-2295
VS.	:	SECTION "L"
	:	JUDGE HAIK
MELVIN GOODIE, INDIVIDUALLY, AND AS A PEACE OFFICER FOR THE CITY OF BREAUX BRIDGE, ET AL	:	MAGISTRATE TYNES

JUDGMENT

THIS MATTER was tried before the Honorable Richard T. Haik on December 16-17, 1991, and January 27-28, 1992. For the reasons set forth in the "Reasons for Judgment" dated March 4, 1992, and filed of record on that date:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein against the plaintiffs, RUSSELL PRITCHARD, JR. and DEBORAH PRITCHARD, and in favor of the defendants: CITY OF BREAUX BRIDGE; CHIEF GEORGE MENARD; DAVE CLARK; and HOWARD DEVILLIER. Accordingly, all of the claims of the plaintiffs urged under both federal and state law against the aforesaid defendants are hereby dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claims of the plaintiffs urged against the ESTATE OF MELVIN GOODIE under federal law be and are hereby dismissed with prejudice; however, on their state law claims, judgment is hereby entered in favor of plaintiffs and against the

ESTATE OF MELVIN GOODIE in the amount of Four Thousand Two Hundred Forty-Three and 30/100 ($4,243.30) Dollars, together with post judgment interest and all costs of these proceedings.

THIS DONE AND SIGNED in chambers in Lafayette, Louisiana, on this 27th day of March, 1992.

JUDGE RICHARD T. HAIK
UNITED STATES DISTRICT COURT JUDGE

Respectfully submitted:

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March 4, 1992

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

RUSSELL PRITCHARD, JR., et ux

VERSUS

MELVIN GOODIE,
individually and as a peace
officer for the CITY OF
BREAUX BRIDGE, et al

CV 88-2295
JUDGE HAIK
MAGISTRATE
JUDGE TYNES

REASONS FOR JUDGMENT

Plaintiffs, Russell Pritchard Jr., and his wife, Deborah Pritchard, filed suit against Melvin Goodie, individually and as police officer for the city of Breaux Bridge, George Menard, Breaux Bridge Chief of Police, Officer David Clark, Howard Devillier, and the city of Breaux Bridge. Trial initially began on December 17, 1991, and lasted one day. It resumed January 21, 1992, until its conclusion. Anne E. Watson was attorney for the plaintiffs and Chester Cedars and Michael Harris represented the defendants.

The Facts

Russell Pritchard, Jr., a white man, was driving his car within the city limits of Breaux Bridge. A pick-up truck loaded with furniture was ahead of Pritchard and was being driven by Melvin Goodie. Goodie, who was an off-duty Breaux Bridge police officer at the time, was black.

Because Goodie applied his brakes to make an unexpected left turn, Pritchard had to swerve quickly to avoid an

accident. He responded by rolling down his window and calling out, "stupid nigger", to Goodie.

The facts establish that the pick-up truck was a private vehicle lent to Goodie to haul furniture. It had no emblem, siren, or other indicia of police authority.

After the racial slur, Goodie made a U-turn and chased after Pritchard. Goodie flashed his headlights from dim to bright, honked his car horn, and waved his arm out of the window. Pritchard tried to lose Goodie. When Pritchard arrived at the Ruth Canal Bridge, which is outside the city limits of Breaux Bridge, he was forced to stop because only one lane of traffic is permitted across the bridge. Goodie pulled up, opened Pritchard's car door, and violently struck him three times.

When Goodie left, Pritchard followed him with the intent of getting his license plate number and reporting the incident to the Breaux Bridge police department. According to Pritchard, Goodie never identified himself as a police officer and never told him to go to the police station.

The circumstances of Pritchard and Goodie's arrivals at the police station differ. However, it is undisputed that Goodie never struck Pritchard at the station. Officer Devillier investigated the incident, and filed out an arrest report charging Pritchard with disturbing the peace and resisting arrest. Those criminal charges were subsequently dismissed, and Goodie was found not guilty of criminal charges later filed against him relating to this incident.

The Law

42 USC 1983 provides, in part :

"Every person who, under color of any statue, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes

> to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. ..."

42 USC 1983 forms the basis of one of plaintiffs' theories of liability against Goodie. In order to prevail, they must prove by a preponderance of the evidence that the conduct of the defendant was "under color of state law" and that the conduct resulted in a deprivation of rights, privileges, and immunities secured by the United States Constitution or both. Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989).

Plaintiffs sue George Menard, Breaux Bridge's Chief of Police, under three theories of liability. The first theory is for creating a policy or custom under which unconstitutional policies occurred or allowing such policy or custom to continue, and for being grossly negligent in managing Goodie, who caused the unlawful event. Ledomicile Inc. v. Louisiana, 674 F.Supp. 546 (E.D. La. 1987). Plaintiff contends Menard is also liable under La. C.C. Art. 2320, which says,

> "Managers and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed."

Finally, plaintiffs allege that Menard is liable under the doctrine of respondeat superior.

Plaintiffs urge that the city of Breaux Bridge is liable under 42 USC 1983 on the basis of a policy of deliberate indifference to the constitutional rights of a person within its domain. According to Fiacco v. City of Rensselaer, 783 F.2d 319 (2nd Cir. 1986), a municipality that tolerates unconstitu-

tional acts by its city employees can form the basis for municipal liability.

At the outset, it is important to focus on whether or not Goodie's actions violated 42 USC 1983, since no violation by Goodie would, in essence, mean no liability on the other defendants. With respect to Goodie, both parties agree that it is the nature of the act performed, not the clothing of the actor or even the status of being on duty or off duty, which determines whether an officer is acting under color of state law for purposes of the Civil Rights statute. Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975).

When Goodie followed Pritchard to the Ruth Canal Bridge, there was nothing to indicate that the pick-up truck was a police vehicle or that a police officer occupied it. As stated earlier, the truck had no siren or emblem, and it was privately owned. When Goodie exited the truck and approached Pritchard's vehicle, he was in plain clothes.

Pritchard admitted that he followed Goodie after the altercation to get his license plate number, and he went to the police station to report the incident.

In his deposition, Goodie testified that he tried to identify himself as a police officer. But Pritchard testified that he found out for the first time that Goodie was a police officer when Officer Devillier, who handled the situation at the police station, told him. Pritchard further testified that Goodie never told him to follow Goodie to the police station. According to Pritchard's testimony, Goodie never arrested him. Of great significance was Pritchard's testimony that Goodie never did anything to him to indicate he was a police officer.

This Court concludes that the altercation between Pritchard and Goodie was simply an unfortunate one between two private citizens. Plaintiffs have failed to prove that the actions were "under color of state law". Therefore, plaintiffs cannot prevail under 42 USC 1983. Plaintiffs also fail to meet

their burden of proof with respect to the state law claims under La.C.C. Art. 2320, excessive force, or intentional infliction of emotional harm.

Further, although acts of violence can rarely be condoned, the event triggering the altercation was a racial slur directed at Goodie.

With respect to the claims against Chief Menard, the other officers, and the city of Breaux Bridge, this Court can find no liability on their part. With specific reference to the Breaux Bridge police department, Officer Devillier, the officer in charge, and Officer Clark, the dispatcher, handled the matter very professionally. Although Goodie was angry and yelling at the police station, as was Pritchard, Officer Devillier separated the men and diffused the situation.

According to the deposition of Gerald LeBlanc, a neighbor of the Pritchards who accompanied Mrs. Pritchard to the police station, "He (Devillier) was trying to do the job properly and trying to find out what happened and tried to keep peace at the same time."

Officer Devillier, who is no longer with the Breaux Bridge police department, testified that he made the decision to book Mr. Pritchard on the charges after discussing it with Mr. Goodie and drawing his own conclusion. He further testified that he performed all of the police functions.

In addition to finding that Goodie did not act under color of state law, this Court finds that no other defendant acted with deliberate indifference or in any other manner which would trigger liability on its behalf. Further, the record reveals that in various instances where members of the Breaux Bridge police department behaved below acceptable standards, those members were disciplined. These disciplinary measures ranged from suspension without pay to termination.

Because of the allegations in this suit, the Court feels that it is necessary to make some comment upon the credibility

of some of the witnesses who testified at trial. Howard Devillier's testimony was very believable. The same cannot be said for Mr. Pritchard. Although Mr. Pritchard testified that he was reluctant to leave his house and fearful as a result of this incident, he testified that he subsequently attended the Breaux Bridge Crawfish Festival, a nationally known event drawing thousands of people. Even more incredible, he also testified that he did not know whether or not calling a black man "stupid nigger" would be inflammatory. Mr. Pritchard further testified that he is more fearful from the altercation with Goodie, who is now deceased, than as the victim of an incident where he was shot six times. The perpetrator in the second incident is still alive. The Court finds the testimony of Mr. Pritchard incredible and unbelievable.

This Court does, however, find that Melvin Goodie is individually liable for his actions of September 17, 1987. He is responsible for the doctor bills of Yongue and Montgomery, who Pritchard saw as a result of the physical injuries. He is also responsible for the emergency room bills and any pharmaceutical bills.

However, the past and future bills of Dr. Cole, a psychologist who Mr. Pritchard sees, are not so easy to delineate. The record reflects that Mr. Pritchard saw Dr. Cole weekly from March 1988 through August 1988. Those visits began some six months after the altercation with Goodie, and also after Mr. Pritchard was shot in an unrelated incident shortly after September 17, 1987. Dr. Cole charges $110 per visit. From August 1988 through August 1991, Mr. Pritchard saw Dr. Cole only three times. Mr. Pritchard has seen Dr. Cole every week since September 1991, but it is important to note that trial commenced in December 1991. Further, the testimony establishes that these visits have not been solely related to the incident with Melvin Goodie; Dr. Cole has helped Mr. Pritchard to deal with other problems in his life such as the shooting and his relationship with his father. Melvin Goodie should not be held responsible

for all of Dr. Cole's bills. Therefore, Melvin Goodie is liable for one half of Dr. Cole's bills incurred through August of 1991.

Melvin Goodie is also liable for $2500, an amount this Court feels is due Mr. Pritchard and his wife as a result of their mental anguish and pain and suffering.

Defendant is to submit a judgment in accordance with the terms of these reasons and approved as to form by the plaintiff. THUS DONE AND SIGNED, this 11th day of March, 1992.

JUDGE RICHARD T. HAIK

Supreme Court, U.S.
FILED
JUL 30 1993
OFFICE OF THE CLERK

NO. 93-112

In the Supreme Court of the United States

OCTOBER TERM, 1993

RUSSELL PRITCHARD, JR., ET UX
Petitioners,

v.

MELVIN GOODIE, ET AL
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeal err in affirming the Trial Judge's factual finding that the actions of Officer Melvin Goodie when he beat Russell Pritchard, although he was off duty, did not constitute conduct "under color of state law" as required by 42 U.S.C. Section 1983?

LIST OF ALL PARTIES

1. **RUSSELL PRITCHARD, JR.**, petitioner

2. **DEBORAH PRITCHARD**, petitioner

3. **CITY OF BREAUX BRIDGE**, respondent

4. **CHIEF GEORGE MENARD**, Chief of Police for the City of Breaux Bridge, respondent

5. **OFFICER HOWARD DEVILLIER**, respondent

6. **OFFICER DAVE CLARK**, respondent

7. **ESTATE OF MELVIN GOODIE**, respondent

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STATEMENT OF THE CASE

A. Statement of Facts

Unless otherwise indicated during the course of this brief, the term "defendants" shall refer exclusively to: City of Breaux Bridge; Chief George Menard; Officer Howard Devillier; and, Officer Dave Clark. The remaining defendant named in the original complaint filed in these proceedings, Melvin Goodie, is unrepresented.[1] The term "plaintiff" or "complainant" shall refer only to Russell Pritchard, even though the plaintiffs in the lower courts were both Pritchard and his wife. The defendants are the respondents before this Honorable Court, while the plaintiff and his wife, Deborah Pritchard, are the petitioners in the writ application before this Honorable Court.

The facts surrounding this action, as established at trial, do not appear to be significantly disputed. However, the plaintiff's characterization of the factual perimeters of this case, as well as inferences drawn therefrom, all as reflected in his writ application, is somewhat inaccurate and omits several matters of import. Accordingly, the following recapitulation and embellishment of the evidence adduced at trial, and left undisturbed by the United States Court of Appeals for the Fifth Circuit, are submitted for the Court's edification:

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[1] Melvin Goodie died prior to trial and, therefore, his estate was substituted as a defendant pursuant to Rule 25 of the Federal Rules of Civil Procedure. R. 143, Vol. 1; Tr. 3, Vol. 7. His estate was not represented at trial, nor has any appearance been effected on the estate's behalf in any proceedings in the courts below.

1. The date of the occurrence between Goodie and Pritchard was on the evening of September 17, 1987. Tr. 190, Vol. 6.

2. A driving incident on Rees Street in Breaux Bridge, Louisiana, resulted in plaintiff calling Melvin Goodie a "stupid nigger", Tr. 192, Vol. 6; Tr. 43-44, Vol. 7; Tr. 53-54, Vol. 6.

3. Goodie pursued the complainant in his vehicle from the City of Breaux Bridge to the Ruth Bridge located approximately 4 miles outside the city limits. During that pursuit, Pritchard was aware that he was being followed by Goodie as a consequence of his inflammatory and defamatory remarks. Tr. 42-43, Vol. 7; Tr. 55-58, Vol. 7.

4. The only physical confrontation between Goodie and Pritchard occurred at the Ruth Bridge located outside the jurisdictional limits of the Breaux Bridge Police Department. Tr. 80, Vol. 7.

5. On the night in question, Melvin Goodie was off duty, was dressed in plain clothes, was operating a private vehicle, and displayed no indicia of being an officer of the law. Moreover, Goodie never identified himself to Pritchard as a policeman. Tr. 72-77, Vol. 7; Tr. 191-192, Vol. 6; Tr. 46, Vol. 6.

6. Pritchard stopped at the Ruth Canal Bridge, a one lane structure, in order to permit oncoming traffic to clear. He did not stop in response to anything Melvin Goodie did during the aforementioned pursuit. Tr. 200, Vol. 6.

7. After the altercation at the Ruth Canal Bridge, Pritchard followed the Goodie vehicle to record his license tag number. He then went to the Breaux Bridge Police Station to report the incident, having no idea that Goodie was an off duty police officer. Tr. 72, 209-210, Vol. 7.

8. After their arrival at the Breaux Bridge Police Station, which was coincidental only, Goodie performed absolutely no function of a police officer, nor displayed any authority of an officer of the law. Tr. 72-77, Vol. 7; Tr. 105-106, Vol. 6; Tr. 108-109, Vol. 6; Tr. 113, Vol. 6.

9. Officer Howard Devillier was summoned, at the request of Goodie, to address the situation which had arisen as a consequence of the confrontation at the Ruth Bridge between Goodie and Pritchard. Tr. 168, Vol. 6.

10. The investigation of this incident, formal arrest, booking and bonding of the plaintiff, as well as the reports prepared as a result thereof, were the product of the efforts of Officer Howard Devillier.[2] Melvin Goodie played no role what-

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[2] The booking sheets, reports and other documents normally required as a consequence of an arrest by a Breaux Bridge Police Officer *were completed by Officer Devillier.* These documents were: Waiver of Rights Form (Exhibit P-11; Tr. 101, Vol. 6; Tr. 104-105, Vol. 6); the booking sheet (Exhibit P-12; Tr. 43, Vol. 6; Tr. 104-106, Vol. 6); and, the arrest report (Exhibit P-22; Tr. 47, Vol. 6; Tr. 104-106, Vol. 6). The appearance bond (Exhibit P-30) was prepared by Officer Dave Clark who was the dispatcher on the night of the incident. Tr. 175-176, Vol. 6. After an arrest, it is customary for the dispatcher to complete the appearance bond, as opposed to the investigating officer. Tr. 175-176, Vol.6.

soever in any of the foregoing except to relate to Devillier his version of the incident, just as Pritchard did, and just as any other ordinary citizen would have been expected to do under the circumstances. Tr. 43, Vol. 6; Tr. 47, Vol. 6; Tr. 51, Vol. 6; Tr. 104-106, Vol. 6; Tr. 118, Vol. 6.

It should also be noted that the Breaux Bridge Police Department is a rural police agency consisting of an elected Chief of Police and 16 police officers, inclusive of dispatchers and patrolmen. Tr. 38, Vol. 4. George Menard is the elected Chief of Police of Breaux Bridge, having served in that position continuously since 1965. Tr. 8, Vol. 4. On September 17, 1987, Howard Devillier, Dave Clark and Melvin Goodie were commissioned police officers with the Breaux Bridge Police Department and had been employed as such since 1986, 1983 and 1985, respectively. Tr. 29, Vol. 6; Tr. 166, Vol. 6; Exhibit P-8, p. 6. Their duties were those of patrolmen, except that Officer Dave Clark frequently worked as a dispatcher as well. Tr. 29, Vol. 6; Tr. 166, Vol. 6; Exhibit P-8, p. 6; Tr. 167, Vol. 6.

B. Course of Proceedings and Disposition in Lower Courts

On September 14, 1988, Russell Pritchard, Jr. and Deborah Pritchard filed suit against defendants, Melvin Goodie, Chief George Menard, the City of Breaux Bridge, Officer Howard Devillier and Officer Dave Clark. The plaintiffs alleged a violation of their civil rights under 42 U.S.C. §§1983, 1985, 1986 and 1988, as well as the First, Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction of the court of first instance was premised upon 28 U.S.C. §§1331 and 1343.

The case was tried, without a jury, before the Honorable Richard Haik on December 16, 1991, and December 17, 1991, and was thereafter continued to January 27, 1992, and January 28, 1992. The action was taken under advisement by Judge Haik and Reasons for Judgment were rendered on March 4, 1992, dismissing plaintiffs' claims against all defendants, except the Estate of Melvin Goodie, which was found liable under pendent state law claims. R. 328, Vol. 3; see Appendix 3, pp. 22-28 of Appendix to petitioners' writ application. A judgment was signed by the trial court on March 27, 1992, in accordance with the previously entered Reasons for Judgment. R. 363, Vol. 3; see Appendix 2, pp. 19-21 of petitioners' writ application. Plaintiffs appealed the trial court's decision on April 9, 1992. R. 365, Vol. 3. The decision of the trial court was subsequently affirmed by the United States Court of Appeals for the Fifth Circuit on March 25, 1993. See Appendix 1, pp. 17-18 of Appendix to Petition for Writ of Certiorari filed by Russell Pritchard, Jr.

SUMMARY OF ARGUMENT

During the course of this litigation, defendants have steadfastly maintained that the actions of Melvin Goodie adopted on September 17, 1987, were those of a private citizen and not under "color of law", a position which was embraced with unanimity by the courts below. The acts of police officers in the ambit of their personal, private pursuits do not fall within 42 U.S.C. §§1983, et seq. *Stengel v. Belcher,* 522 F.2d 438 (6th Cir. 1975); *Delcambre v. Delcambre,* 635 F.2d 407 (5th Cir. 1981). The jurisprudence of this country has further held that to determine whether an officer is acting under "color of law", one must

necessarily analyze the *nature of the act performed* and the reasons therefor. *Stengel v. Belcher,* supra.

The plaintiff has admitted that Melvin Goodie never adopted any act to indicate, or even intimate, that he was a peace officer. On the night of the incident, Goodie was dressed in plain clothes, was off duty, was driving a private automobile, and had no weapons or badge on his person. As a matter of fact, the complainant did not even learn that Goodie was a police officer until approximately five (5) minutes after he arrived at the Breaux Bridge Police Station when he was so informed by Officer Howard Devillier. The confrontation between plaintiff and Goodie was precipitated by Pritchard calling Goodie a "stupid nigger" while both were in the course of personal, private pursuits.

Additionally, when Goodie and the complainant confronted each other at the police station, the situation was addressed by Officer Howard Devillier who was summoned to handle this matter *at the request of Goodie.* As both Pritchard and Goodie have admitted, the latter played no role whatsoever in the investigation of this incident and/or the interrogation and booking of the plaintiff, except to relay information to Officer Devillier regarding what had transpired between him and Pritchard. All traditional police duties were discharged by officer Devillier, solely and exclusively. This is undisputed.

Both of the courts below closely analyzed the evidence of record and determined, without dissent, that the facts adduced at the trial of this case disclosed that on the evening of September 17, 1987, Melvin Goodie did not act pursuant to or as a consequence of the authority vested

in him by virtue of his being a peace officer. Without question, the standard of review pertinent in this action is the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. Plaintiff, the petitioner before this Honorable Court, now suggests that the factual findings during the adjudicatory process in the courts below were "clearly erroneous" and should, therefore, be reevaluated.

Defendants-respondents maintain that the factual findings of the courts below, and the legal conclusions drawn therefrom, are not erroneous. Furthermore, to grant the Writ of Certiorari would be offensive to the rules of this Honorable Court, particularly Rule 10 which sets forth the criteria normally considered by the Court in its review of writ applications.

As a consequence of all of the above, the decisions of the lower courts are correct, and complainant's Petition for Writ of Certiorari should be dismissed.

REASONS FOR DENYING THE WRIT

THE COURTS BELOW DID NOT ERR IN FINDING THAT THE ACTIONS OF MELVIN GOODIE ON SEPTEMBER 17, 1987, WERE NOT "UNDER COLOR OF LAW" IN ORDER TO SANCTION AN ACTION UNDER 42 U.S.C. §1983.

The sole inquiry before this Honorable Court is whether Melvin Goodie acted "under color of state law" on Septmber 17, 1987. As previously noted, the lower courts found that Goodie's actions on that date were those of a

private citizen and bore no relation to his status as a peace officer. The decisions of those courts are based upon findings of fact, which must be sustained, particularly in view of Rule 52(a) of the Federal Rules of Civil Procedure and Rule 10 of the rules of this Honorable Court.

In its reasons for judgment, the trial court found that:

> "This Court concludes that the altercation between Pritchard and Goodie was simply an unfortunate one between two private citizens. Plaintiffs have failed to prove that the actions were 'under color of state law'. Therefore, plaintiffs cannot prevail under 42 USC 1983."

See p. 25, Appendix 3 of the Petition for Writ of Certiorari. Moreover, the trial court concluded that:

> "With specific reference to the Breaux Bridge police department, Officer Devillier, the officer in charge, and Officer Clark, the dispatcher, handled the matter very professionally. Although Goodie was angry and yelling at the police station, as was Pritchard, Officer Devillier separated the men and diffused the situation.
>
> According to the deposition of Gerald LeBlanc, a neighbor of the Pritchards who accompanied Mrs. Pritchard to the police station, 'He (Devillier) was trying to do the job properly and trying to find out what happended and tried to keep peace at the same time.
>
> Officer Devillier, who is no longer with the

> Breaux Bridge police department, testified that he made the decision to book Mr. Pritchard on the charges after discussing it with Mr. Goodie and *drawing his own conclusion.* He further testified that he performed all of the police functions...
>
> Because of the allegations in this suit, the court feels that it is necessary to make some comment upon the credibility of some of the witnesses who testified at trial. Howard Devillier's testimony was very believable. The same cannot be said for Mr. Pritchard."

See p. 26, Appendix 3 to plaintiff's Petition for Writ of Certiorari.

42 U.S.C. §1983 provides that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

This Court has succinctly, yet accurately, defined the

elements which a plaintiff, by a preponderance of the evidence, must establish in order to prevail in a Section 1983 action:

> "First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.' " (citations omitted)

Adickes v. S. H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970).

The acts of police officers in the ambit of their personal, private pursuits do not fall within the purview of 42 U.S.C. §§1983, et seq. *Stengel v. Belcher,* 522 F.2d 438 (6th Cir. 1975); *Delcambre v. Delcambre,* 635 F.2d 407 (5th Cir. 1981). Nonetheless, police officers are held to be acting under color of law when they undertake to perform *official* duties, whether they are on duty or off duty. *Screws v. United States,* 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). To determine whether an officer is acting under "color of law" one must necessarily focus upon the *nature of the act performed* and the reasons therefor. Hence, it is necessary to scrutinize the actions of Melvin Goodie to determine if his conduct on the evening of September 17, 1987, was *personal* or in furtherance of his official duties as an officer of the Breaux Bridge Police Department.

There is no dispute regarding the fact that on the night in question, Melvin Goodie was off duty. See page 10 of plaintiff's writ application. On the other hand, complainant has premised his argument that Goodie nevertheless acted "under color of law" based exclusively upon Goodie's own self-serving testimony.[3] In essence, Goodie's testimony, upon which the plaintiff desperately clings in this action, was to the effect that:

A. He pursued the plaintiff from the City of Breaux Bridge to the Ruth Canal Bridge because of the complainant's erratic driving behavior. Exhibit P-9, p. 36.

B. He displayed his officer's badge while in pursuit of the Pritchard vehicle by holding his arm out of the truck window with the badge in his hand. Exhibit P-9, pp. 38, 42, 43, 44; Exhibit P-8, p. 25.

C. While in pursuit of the Pritchard vehicle, Goodie blinked his headlights and blew his vehicle's horn, all in an attempt to stop the complainant's automobile. Exhibit P-8, p. 27; Exhibit P-9, p. 39.

D. Upon first approaching the Pritchard vehicle at the Ruth Bridge, Goodie identified himself as a police officer and displayed his badge of authority. Exhibit P-8, p. 27.

E. Pritchard attempted to reach for a revolver

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[3] Goodie's testimony was adduced at trial through the mechanisms of a pre-trial deposition (Exhibit P-8) and a transcript of his testimony at a criminal trial on charges which arose out of the incident before this Court (Exhibit P-9).

located on the seat of his vehicle which prompted Goodie to strike him in an act of self-defense. Thereafter, the complainant exited his vehicle and attempted to strike Goodie, at which time he again acted to defend himself by hitting Pritchard. Exhibit P-8, pp. 27-28; Exhibit P-9, pp. 42-43, 47.

F. After the physical altercation described above, Goodie advised the plaintiff that he was under arrest and instructed him to follow him (Goodie) in his vehicle to the Breaux Bridge Police Station. Exhibit P-8, p. 28; Exhibit P-9, p. 44.

Notwithstanding the foregoing, the plaintiff now requests that this honorable Court accept the testimony of Melvin Goodie (which obviously the courts below did not do) and at the same time *reject his own admissions* at trial which proved that:

A. While following plaintiff from the City of Breaux Bridge to the Ruth Canal Bridge, Goodie did nothing to indicate that he was an officer of the law. In fact, Pritchard testified that Goodie attempted to cause an automobile accident by passing him at one point and then suddenly hitting his brakes, thus causing the plaintiff to take evasive action. Tr. 199, Vol. 6; Tr. 71, 200-202, 202-204, Vol. 7.

B. Goodie struck the complainant without any warning whatsoever, and in doing so simply uttered the words, "This is for you, you white honky". Tr. 55-56, Vol. 7.

C. The plaintiff stopped his vehicle at the Ruth Canal Bridge only to wait for traffice to clear the one lane structure, as opposed to any action or command from Goodie. Tr. 206-208, Vol. 6.

D. Pritchard followed Goodie after the physical altercation simply to obtain his license number so that he could report the alleged attack to the appropriate police authorities. Tr. 72, 209-210, Vol. 7.

E. Goodie and Pritchard arrived at the Breaux Bridge Police Station simultaneously and coincidentally. The complainant's intent was to report the alleged criminal acts of Goodie, Tr. 210-211, Vol. 6; Tr. 73, Vol. 7.

F. After Pritchard was at the police station for approximately 5 minutes, he learned, from Officer Devillier, for the first time, that Goodie was an off duty police officer. Tr. 212-213, Vol. 6; Tr. 73, Vol. 7.

G. Prior to being advised that Goodie was an officer of the law, Pritchard had no inkling whatsoever that Goodie was a policeman and, in fact, never surrendered himself in any respect as a consequence of an official order or command from Goodie. Simply speaking, Goodie never performed or adopted any action whatsoever that would indicate to anyone that he was an officer of the law or that any of his actions taken on the night of September 17, 1987, were pursuant to any authority imposed upon him as a consequence of his being a commissioned police officer. Tr. 73-77,

Vol. 7.

H. Goodie was dressed in plain clothes, was off duty and was driving a vehicle which was not an official vehicle, nor had any such identifying marks. Tr. 72-77, Vol. 7.

I. At no time did Melvin Goodie identify himself to plaintiff, or anyone else for that matter, as an officer of the law. Tr. 209, Vol. 6.

Additionally, Officers Howard Devillier and Dave Clark testified that after the arrival of the plaintiff and Goodie at the Breaux Bridge Police Station, the latter performed absolutely no function of a police officer, nor displayed any authority of an officer of the law. Tr. 105-106, 108-109, 113, Vol. 6; Tr. 72-77, Vol. 7. Furthermore, the investigation of the incident, formal arrest and booking of the plaintiff, in addition to the reports prepared, were the result of the efforts of Officer Howard Devillier, exclusively. Goodie played no role whatsoever in any of the foregoing except to relate to Devillier his version of the incident, just as Pritchard did, and which any other ordinary citizen would have been expected to do. Tr. 43, 47, 51, 104-106, 118, Vol. 6.

In the face of the foregoing, the trial court chose to accept the factual version *as related by Pritchard* on this threshold issue of "color of law", all as directly and inferentially substantiated by Officers Devillier and Clark. R. 331-332, Vol. 3; Appendix 3 to plaintiff's Petition for Writ of Certiorari, pp. 22-27. It is defendants' position that the findings of fact by the lower courts in the above regard are correct and, under the jurisprudence of this country, must

be accorded great deference and left undisturbed absent clear error. 28 U.S.C., Rule 52(a), Fed.R.Civ.P.; U.S. Sup. Ct. Rule 10, 28 U.S.C.; *NCH Corporation v. Broyles,* 749 F.2d 247 (5th Cir. 1985).

On page 14 of his writ application, plaintiff isolates various "activities" of Melvin Goodie which he contends substantiate that Goodie acted under "color of law" on the evening of September 17, 1987. As previously noted, the bulk of these "activities" is based upon the uncorroborated and self-serving testimony of Goodie. Additionally, these factors ignore Pritchard's own testimony, as well as that of the other witnesses who testified at trial.

As an illustration of the illegitimacy of the plaintiff's position in this respect, while the booking sheet designates the arresting officer as Melvin Goodie, that information, as verified by Officer Devillier, was based solely and exclusively upon what Goodie told Devillier. Likewise, the document itself was completed by the only officer in charge on the night in question, Howard Devillier. In fact, Officer Devillier prepared all of the arrest documents based upon information given to him by Goodie, and all traditional police duties associated with the arrests of the plaintiff were performed, solely and exclusively, by Devillier.

Officer Devillier testified that he treated Goodie no differnently than he would have any private complainant involved in such an incident. Tr. 106, Vol. 6. The only evidence to the effect that Goodie attempted to identify himself as a police officer and "arrested" Pritchard is the testimony of Goodie. Every other witness contradicts and refutes this contention. In fact, Pritchard himself admits

that after Goodie struck him at the Ruth Canal Bridge, he drove away. Pritchard's pursuit of Goodie at this juncture was an attempt to obtain the license tag number of Goodie's vehicle so that he could report the incident *to the police.* Tr. 72, 209-210, Vol. 7.

In spite of the above, plaintiff now invites this Honorable Court to discount his own testimony, and that of the other witnesses in this case, and accept only that of Goodie, an invitation which the lower courts declined. It is, exclusively, Goodie's self-serving testimony at a pre-trial deposition (Exhibit P-8) and a criminal trial (Exhibit P-9) which remotely intimates that he acted under "color of law"; but, interestingly, if one accepts Goodie's version of the events (so as to find action "under color of law"), then the Court must also accept Goodie's testimony which indicates that his actions (the force employed by him against Pritchard) were warranted and not excessive under the circumstances. That is, the striking of Russell Pritchard, if one accepts Goodie's testimony only, at the Ruth Canal Bridge was an act of self-defense to repel the aggressive action of the plaintiff. To say that the complainant finds himself in a "Catch 22" situation on this point is an understatement.

Hence, defendants submit that Pritchard cannot carry the burden of persuasion imposed upon him by law. *Thibodeaux v. Bordelon,* 740 F.2d 329 (5th Cir. 1984); *Baltezore v. Concordia Parish Sheriff's Department,* 767 F.2d 202 (5th Cir. 1985), cert. den. 474 U.S. 1065, 106 S.Ct. 817 (1985). It is difficult to perceive how the complainant can, in good faith, seek recovery for the *alleged* misconduct of Goodie on the one hand while, on the other hand, request that this Court reject his own sworn, unrefuted testimony

about the events upon which his claims are fundamentally based.

Accordingly, the evidence of record clearly and unequivocally supports the findings of fact by the courts below to the effect that Melvin Goodie did not act under color of law on September 17, 1987. Rather, his actions were adopted to avenge the insulting, racist remarks directed to him by the plaintiff; purely and simply, the nature of his actions was personal. Likewise, *by virtue of his own testimony,* the plaintiff has failed to isolate any factors which demonstrate that Goodie acted as a police officer, thus igniting the protective guise of 42 U.S.C. §§1983, et seq. The decisions of the courts below, therefore, are correct and should remain undisturbed.

CONCLUSION

The conduct of Melvin Goodie on the night in question falls within the ambit of his personal, private pursuits, as the lower courts correctly held. He did not undertake to perform an official act or duty. *Delcambre v. Delcambre,* supra; *Screws v. United States,* supra. Accordingly, no liability can be assigned to the defendants pursuant to the federal claims urged by the plaintiff in this litigation.

The basis of the writ application of the plaintiff addresses factual findings by the lower courts. The record of these proceedings reflects that the factual findings of the trial court and court of appeal are not clearly erroneous. Moreover, the factors normally relied upon by this Honorable Court in its deliberations on whether to grant a petition for a writ of certiorari are not implicated by the

plaintiff's arguments urged in the writ application. See U.S. Sup. Ct. Rule 10, 28 U.S.C.

In consideration of all of the foregoing, defendants submit that the judgments of the courts below are correct in all respects. Thus this Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted:

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